setting forth their respective contentions, views of the facts and theories of the lawsuit."

The statute only demands that all parties in a jury case have the right to make an opening statement prior to the presentation of evidence; it is silent as to which party must deliver its opening statement first.

Therefore, it appears that the allegation of the petitioner is specious at best. The respondent submits that in the instant case petitioner has failed to show that the question here involved is substantial or is of broad national concern.

CONCLUSION

As the petitioner presents no question which merits this Honorable Court's review upon a writ of certiorari, respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted

ALEX B. SHIPLEY, JR.
Assistant Attorney General
State of Tennessee
420 Supreme Court Building
Nashville, Tennessee 37219
Attorney for Respondent

APPENDIX

APPENDIX I

In the Court of Criminal Appeals of Tennessee
at Knoxville

October Term, 1971

Roy D. Plott,
Plaintiff-in-Error,
v.
State of Tennessee,
Defendant-in-Error.

Second Degree Murder
Hamilton County
Hon. Campbell Carden, Judge

For Plaintiff-in-Error:

Charles Wagner, III, 11th Floor, Volunteer Building, Chattanooga, Tennessee; Richard Korsokov, 11th Floor, Volunteer Building, Chattanooga, Tennessee.

For Defendant-in-Error:

David M. Pack, Attorney General, Nashville, Tennessee; Alex B. Shipley, Jr., Assistant Attorney General, Nashville, Tennessee; Edward E. Davis, District Attorney General, Chattnooga, Tennessee; Robert Batson and Lawrence Young, Asst. District Attorneys-General, Chattanooga, Tennessee.

Judgment Affirmed

John A. Mitchell, Judge

Opinion Filed: December 10, 1971

OPINION

Roy Douglas Plott, the defendant, whom the witnesses refer to as Doug Plott, was on April 8, 1971 convicted

in the Criminal Court of Hamilton County, Tennessee of second degree murder of James Henry Schouggins on June 13, 1970. The jury fixed the punishment at fifteen years in the penitentiary upon which the Trial Judge Honorable Campbell Carden, pronounced judgment of not less than 10 nor more than 15 years in the penitentiary. On June 7, 1971, the motion for a new trial was overruled, the defendant prayed and was granted an appeal.

Counsel for the defendant acted as retained counsel upon the trial. After the motion for a new trial was overruled the defendant was found to be indigent and his trial counsel appointed by the court to prosecute the appeal.

According to the testimony of the State's witness, Doris Jean Schouggins, she lived at 512 Hamilton Avenue, Chattanooga, Tennessee, Hamilton County, with her children. The house in which they lived was 4 or 5 feet elevation above the sidewalk with seven or eight steps leading from the yard down to the sidewalk. The porch of the house was about 20 feet from the steps.

On or about June 13, 1970, in the evening, James Henry Schouggins, the divorced husband of Doris Jean Schouggins, was at the Schouggins' home for a visit with their children. That about 11:30 P. M. her little boy was sitting on the porch and he called for Mr. Schouggins to come out and told him that some boys out on the street were hollering at him. Mr. Schouggins went out into the yard between the porch and the steps which lead from the yard down to the sidewalk, and told the boys to leave, that they were making a pretty loud racket. The defendant and two or three other boys were down on the sidewalk and they got into an argument with Mr. Schouggins. Then the boys apologized, shook hands and walked back to the car. She and her little boy and Mr. Schouggins turned and walked toward the house because she thought the boys were leaving. About that time one of the Plott boys got a ball bat and came back up into the yard be-

hind them and somebody screamed and the Plott boy struck Mr. Schouggins in the side of the head with the bat. She did not see but one blow struck. She said she was at first mistaken about the first name of the defendant but that it was a Roy D. Plott who struck Mr. Schouggins with the bat. The defendant Plott and the other boys ran back to the car, got in it, and left. She did not see any gun. That Mr. Schouggins lived only a few hours after being struck with the bat.

Larry Adams, who testified he was a friend of the Plott boys, said he had known the defendant Doug Plott since he was in the fourth grade. That they got together on the afternoon of June 13, 1970, and drove around a while drinking beer. At the suggestion of some of the group the defendant Roy D. Plott, his brother Larry Plott, and Larry Jenno, went with him by 512 Hamilton Street, the scene of the trouble for the purpose of seeing Mary Ann Queen, a daughter of Mrs. Schouggins. Mr. Schouggins came out of the house and told them to leave. Then Mr. Schouggins and Doug Plott got into an argument. Mr. Schouggins was up in the yard and Doug was on the sidewalk. Larry Jenno went up and talked to them and apparently reconciled them. They then shook hands. The defendant Doug Plott came back to the car and Larry Plott was still up on the sidewalk arguing with Mr. Schouggins "and before you know it Doug (Plott) had done run back up there and had the ball bat." "All I saw was two blows. The first one was low, the second one had to have been the one that killed him." That the first blow was on the leg and the second one about the head. That when Mr. Schouggins was hit he fell back up into the yard. They took the Plott boys and let them out at their house. That he did not see any gun but he did hear the word mentioned.

According to the testimony of Larry Jenno, he, together with Larry Adams and the Plott boys, drove by Mrs.

Schouggins' house to see Mary Ann Queen. The deceased Schouggins came out of the house and he and Doug Plott started arguing. Then he came down the steps. Another car drove up and Jenno was talking to them while Doug and Mr. Schouggins were arguing. That Larry Plott got out of the car and him and Doug was arguing with Mr. Schouggins. Jenno said he walked up and shook hands with Mr. Schouggins and told him to forget all about it and then everything quietened down and he went back and was talking to Charlie Green, the boy in the '57 Chevrolet and when he looked back there Doug had the bat and he struck Schouggins twice. He hit him once on the leg and the second blow hit him up about the head. Mr. Schouggins, when he got hit was right up at the top of the steps that lead from the sidewalk right up to the yard. The walk runs from the steps to the porch. Jenno testified that after he talked to Mr. Schouggins he then walked back down the steps. That the bat was in the back floorboard of his car and belonged to him. That Mr. Schouggins fell down in the yard near the top of the steps and about 15 feet from the porch.

Billy Ray Davis testified that he was a homicide investigator for the Chattanooga Police Department. That he answered a call on June 13, 1970, at 512 Hamilton Avenue and that he saw the deceased, James Henry Schouggins, at Erlanger Hospital and that the doctors were working with him and he expired about 1:50 A.M.

That he advised the defendant Roy D. Plott about his constitutional rights and that he signed a waiver and made a voluntary statement to the officer who wrote it down on the typewriter as he gave it.

The defendant stated to the officer that he was in an automobile with Larry Adams, Larry Jenno, and his own brother Larry Plott. That they had been riding around and drinking beer and then went to 512 Hamilton Street

where Mrs. Schouggins lived to see some girls. That a white man came to the top of the steps and he and the defendant started an argument because he wanted them to leave. That Larry Plott, his brother, jumped out of the car and started arguing with the man also. Larry started up the steps and the man grabbed him and pushed him back.

That the defendant started back to the car and his brother Larry started back up the steps. That the man (Schouggins) took off his glasses and put them in his pocket and that the defendant turned back and someone called out that he had a gun. That the defendant's brother was standing directly in front of the man and that they were still arguing. That the defendant said he ran to the car got a ball bat out of Larry Jenno's car, went back half-way up the steps and the man started down and that's when he struck him. That he hit him one time on the leg and he kept coming and he hit him on the head. The defendant then went to the car and then went home, called his Mother who took him to Police Headquarters. That the white man, all the time was calling him and his brother vile names. The defendant said that he was under the impression that the man (Schouggins) had a gun and that the man was trying to get him to come in his yard. That he told the man if he was going to do anything to him he would have to come out in the street. Mr. Davis further testified that the defendant came in and voluntarily surrendered himself and was extremely co-operative.

Dr. George Beckman, the coroner, was not available at that particular time to testify so it was stipulated and agreed between the state and the defendant that the coroner's report would show that the deceased James Henry Schouggins had a two inch laceration above and behind the left ear. That the cause of death was massive head injuries and subdural hemotoma as a result of a

fracture of the skull in the large left temporal bone. Blood alcohol tested negative after death.

The State rested its case.

The defendant Roy D. Plott took the witness stand and testified in his own behalf. That he was 21 years of age and lived at 708 Franklin Street, Chattanooga, about 4 blocks from the scene of the difficulty in question. That he had never been in any trouble before and had been employed until this trouble came up. That on the 13th day of June, 1970, he was in a car with his brother Larry Plott, Larry Adams, and Larry Jenno. That they had driven around and then decided to go to see some girls at the address where Mrs. Schouggins lived, 512 Hamilton Avenue. Larry Jenno was driving. That the defendant did not know the victim Mr. Schouggins and had never seen him before in his life. That he just went along for the ride more or less to see the girls. It was about 12:00 (midnight) when Larry Jenno parked his car in front of Mrs. Schouggins' house and Larry Jenno started using the bathroom on the sidewalk and then to the little boy up in the yard, he made some smart remark about the little boy's sister which offended the little boy and that's when Mr. Schouggins came out and Jenno and Mr. Schouggins got into an argument and the defendant tried to get Jenno back into the car. Mr. Schouggins went inside the house and came back out and that he and Jenno kept arguing. The defendant said he went over to Jenno, grabbed him and tried to pull him back in the car. Then Mr. Schouggins told the defendant to mind his own business, get back in the car and started cursing the defendant. The defendant said he and Mr. Schouggins were still arguing and that Larry Adams was still in the car. That Larry Plott got out of the car and joined in the argument. The defendant said he pushed his brother back and cautioned him not to argue. That Mr. Schouggins was standing at the side of the steps on the wall and

threatened the defendant and tried to get the defendant to come up into the yard, and told the defendant if he did come into the yard that he never would walk again. The defendant said he did not see a gun. That he and Mr. Schouggins then shook hands and the defendant apologized to him and told him he was sorry if he had caused him any trouble. The defendant then went back to the car and had the car door open getting in the car when somebody hollered, "he's got a gun." The defendant said he turned around and saw his brother going up the steps and saw Mr. Schouggins standing over him and that "his mind just went, that he just got so scared he didn't know what to do." That he grabbed the bat and ran across there and pushed Larry down and that he hit Mr. Schouggins with the bat first on the leg and he went down and the defendant turned around and started to leave and Schouggins grabbed him by the leg with his left arm and when he did that the defendant swung at his shoulders and hit him on the top of his shoulder and it bounced and hit him in the head. The defendant's counsel asked if he was scared and the defendant replied, "Yes, sir, I was petrified, I didn't know what to do at first." That he was certain that he heard somebody say, "he's got a gun", but he didn't know who said that. That he did not at any time see a gun but Schouggins had his hand in his rear pocket. The defendant said that just before he hit the man he pushed Larry Plott down and told him to run. He was on the sidewalk. That after this happened he grabbed his brother Larry and pushed him across the street and into the car and they left. That it was Larry Jenno's car and he was driving it. That he went home and told his Mother and phoned the police and voluntarily surrendered himself. The defendant said with reference to this incident, "it is horrible in my mind, I can't sleep at night for it." That he was really sorry about it. That he has a chronic heart condition which he has had all his life as a result of rheumatic

fever. That he attempted to join the Army and they took him in at Knoxville and when they took him to Fort Campbell they gave him a medical discharge because of this heart condition. The defendant said he had drunk 5 beers between 6 o'clock and 12 o'clock and that he imagined that he was under the influence.

ASSIGNMENT OF ERROR

In his first assignment of error the defendant contends the verdict was not supported by any material evidence, and was contrary to the law and the evidence in the case. He specifically insists that the facts of the case rebut the presumption of malice. With this we cannot agree.

In considering this assignment and in examining this contention we are confronted with the rule that a verdict of guilt, approved by the trial judge, accredits the testimony of the State and establishes the State's theory of the case; that under such a verdict the presumption of innocence which the law throws around an accused and which stands as a witness for him in his trial disappears, and upon appeal that presumption of innocence is replaced by a presumption of guilt; that this Court is not permitted to reverse a conviction upon the facts unless the evidence clearly preponderates against the verdict of the jury and in favor of the innocence of the accused; that we may review the evidence only to determine whether it preponderates against the verdict and in favor of his innocence. **Haas v. State**, ... Tenn. Crim. App., 455 S. W. 2d 634; **Gulley v. State**, 219 Tenn. 114, 407 S. W. 2d 186; **Jamison v. State**, 220 Tenn. 280, 416 S. W. 2d 768; **Webster v. State**, ... Tenn. Crim. App. ..., 425 S. W. 2d 799.

Every homicide is presumed to be malicious in the absence of circumstances rebutting this implied presumption. **Harper v. State**, 206 Tenn. 509, 334 S. W. 2d 933; **Gann v. State**, 214 Tenn. 711, 383 S. W. 2d 32.

Killing with a deadly weapon raises a presumption of malice sufficient to justify a finding of murder in the second degree, in the absence of facts or circumstances rebutting that presumption. **Nance v. State,** 210 Tenn. 328, 358 S. W. 2d 327; **Gann v. State,** *supra*; **Bostick v. State,** 210 Tenn. 620, 360 S. W. 2d 472; **Smith v. State,** 212 Tenn. 510, 370 S. W. 2d 543.

If one person, upon a sudden impulse of passion, without adequate provocation, and disconnnected with any previously formed design to kill, kills another willfully and maliciously, such killing is unlawful and is murder in the second degree. Malice is not necessarily confined to an intention to take the life of the deceased, but includes an intention to do any unlawful act which may probably result in depriving the party of life. It is not so much spite or malevolence to the individual in particular as an evil design in general, the dictates of a wicked and depraved and malignant heart. It may be either express or implied by law. **Warren v. State,** 44 Tenn. 130. See also: 1 Wharton's Criminal Law & Procedure (Anderson), sec. 63.

The credibility of the witnesses, the weight and value of their testimony, the inferences to be drawn from their statements, and all factual issues raised by the testimony and evidence introduced—direct and circumstantial, are matters entrusted exclusively to the jury as the triers of the facts. **Humphrey v. State,** 187 Tenn. 377, 215 S. W. 2d 791; **Cole v. State,** 187 Tenn. 459, 215 S. W. 2d 824; **Steele v. State,** 189 Tenn. 424, 225 S. W. 2d 260; **Smith v. State,** 205 Tenn. 502, 327 S. W. 2d 308; **Hardin v. State,** 210 Tenn. 116, 355 S. W. 2d 105. Thus, the jury has the duty and prerogative in homicide cases of determining the question of malice and whether or not the defendant proved facts or circumstances sufficient to rebut the presumption of malice arising from the fact of the killing. **Gray v. State,** 63 Tenn. 331.

The defendant, according to his own voluntary statement given to the officer immediately after the assault on the victim, ran from where the victim was back to Larry Jenno's car, got a deadly baseball bat and according to his testimony ran back and struck the victim on the leg and then on the head with such force that the victim's skull was fractured, producing death.

The jury rejected the defendant's contention that he was fighting in his self-defense or in defense of his brother. The evidence fails to establish that either of them was in danger of death or great bodily harm. According to the defendant his brother was advancing toward Mr. Schouggins and he got scared and didn't know what to do and he grabbed the bat and ran back toward the victim and struck him twice with the bat.

The jury must have reasoned that if Schouggins actually had a pistol it was strange that he did not draw it and attempt to use it while the Plott brothers were advancing on him.

By his second assignment of error the defendant says the Trial Court erred in requiring him to make his opening statement of his defense, prior to the opening statement of the District Attorney.

At the commencement of the trial, the indictment was read to the Court and the jury, the defendant pleaded not guilty and the jury was sworn. Defense counsel, in the absence of the jury, stated to the court that they did not plan to make an opening statement. That they felt like in a criminal case as well as a civil case the plaintiff has the burden of proof and is required to make the first opening statement, that if they planned to open they would like for the state to precede them. The Trial Judge said, "they don't have to do that." The defendant excepted.

The jury returned to the courtroom and the trial was resumed. The trial judge said: "All right, and then you can make your opening statement, and if the State wants to, they can."

The defense counsel then made an opening statement which was followed by an opening statement by the District Attorney.

T. C. A. 20-1329 provides that:

> "In all actions of a civil or criminal nature tried before a jury, all parties thereto, shall have the right prior to the presentation of any evidence in the case to make an opening statement to the court and jury setting forth their respective contentions, views of the facts and theories of the lawsuit. (Acts 1969, ch. 90, sec. 1.)"

While we think the better practice would have been for the prosecution's opening statement to have preceded that of the defendant, but the matter was within the discretion of the trial judge. We are unable to find that the action of court in requiring the defendant make the opening statement first denied him of the right to be informed about the nature and cause of the accusation against him. There is nothing to show that the defendant suffered any prejudice, and we hold that the trial judge did not abuse his discretion. The assignment is overruled.

The defendant's third and fourth assignments of error will be considered together because they complain that the trial court committed error in allowing the District Attorney, in a preliminary examination of the defendant's witness Edna Mae Anderson, to ask her questions in the presence of the jury about whether she had talked with or in the presence of other witnesses and defense counsel about the case. It was the contention of the defendant that the questions of the District Attorney should not have

been asked in the presence of the jury and that they imputed misconduct on the part of defense counsel, and that a mistrial should have been declared.

We find no merit in these two assignments of error.

The questions of State's counsel were whether the witness had been in company with the defendant or any of the witnesses in the hall or in the courthouse. Her answer was that she believed one of the Plott boys were with them at lunch that she had not talked to any of them about the testimony. The District Attorney asked her if counsel for the defendant had talked to her about the case, and she answered that he had not. Then the court said, "let's be general, did anyone talk to you about your testimony while you were waiting outside before you came in here?" She answered that they had not.

We find nothing in this inquiry to impute any misconduct to counsel or the witness, and find no prejudice resulted to the defendant. The court properly overruled the motion for a mistrial.

In his fifth assignment of error the defendant says the trial court erred in refusing to allow Edna Mae Anderson to testify in behalf of the defendant for the purpose of impeaching the prior testimony of prosecution witness Doris Jean Schouggins, based on extrajudicial inconsistent statements.

Defense counsel on cross-examination had asked Doris Jean Schouggins, "Later on didn't you tell a friend that he (Mr. Schouggins) came back into the house and got a gun?" She answered, "No." Then counsel asked, "Didn't hear your son say that in your presence?" She answered, "I didn't hear nothing about a gun."

To contradict the above quoted testimony, the defendant introduced Edna Mae Anderson who testified in the absence of the jury that Mrs. Schouggins son James said,

"Jim (Schouggins) ran in the house and got a gun", and I said, "He did?" And Mrs. Schouggins said, "He put something in his pocket."

The trial judge sustained the District Attorney's objection and refused to allow the evidence to go to the jury.

We are of the opinion that the witness sought to be impeached or contradicted was entitled more specific notice about the matter of the alleged contradiction.

The time, place and person to whom the declaration was made should have been specifically included in the question and the words or their substance also stated in the question.

Mrs. Anderson's testimony was that Mrs. Schouggins said "he put something in his pocket." That was not what counsel asked. Counsel's question to Mrs. Schouggins was "didn't you tell a friend that he (Mr. Schouggins) came back in the house and got a gun." Mrs. Schouggins said she did not hear anything about a gun. The statement attributed to Mrs. Schouggins' son James was excluded by the trial judge as being hearsay.

The Attorney General in his excellent brief has cited and quoted from **Cole v. State**, 65 Tenn. 238 where the Court said:

> "Where it is intended to impeach the witness by proving that he made statements out of court contrary to what he has testified in court, the witness should be asked whether he said or declared that which it is proposed to prove by the impeaching witness, that he did say or declare, and the time and place and person to whom the declaration was made should also be stated in the question: 1 Gr. Ev., sec. 462 and note 1 Starkie on Ev., marg. pp. 239-40 and notes; 2 Swan, 259."

"The object of the question is to contradict him, and it is but fair to the witness to refresh his recollection as to the declaration or words used and proposed to be proved, and also by stating time, place and other circumstances calculated to refresh his memory."

We think the trial judge was correct in sustaining the State's objection and the assignment is overruled.

In his seventh assignment of error the defendant says the Trial Court erred in allowing the District Attorney, over defendant's objection, to engage in highly prejudicial argument by commenting on the defendant's failure to introduce the testimony of his brother Larry Plott since the witness had been formally offered to the State.

We fail to find any merit in this assignment. The witness, to which reference is made was Larry Plott a brother of the defendant who had been riding in the car with the defendant and other friends immediately prior to the killing of James Schouggins. Larry Plott was present at the time and engaged in an argument with the victim. Larry Plott was the person in whose defense the defendant insisted he was fighting.

The defendant cannot relieve himself of the legal obligation of calling the witness most likely to support his theory by merely saying to the District Attorney, here is Larry Plott, a brother of the defendant, who was present and saw and heard what took place, we are not going to call him as a witness but you may call him if you desire to do so.

Although Larry Plott was as accessible to the State as to the defendant it can hardly be said he was as favorably disposed to the State as to the defendant. The Brown case from the State of Mississippi, cited by the defendant in his brief seems to make no distinction between those of blood relationship and those who are not. Few ties are

stronger that those which exist between blood brothers. We think it would be unreasonable to require the State to go into the family of the defendant and call his brothers or his father to testify against him.

In **Hutchins v. State**, 172 Tenn. 108 the Court said:

> "In the Hays Case, the right of counsel for the State to comment on the failure of the defendant to introduce apparently available witnesses in his behalf was sustained. If it was competent for counsel in that case to argue the presumption arising from such failure, it was competent for the jury in this case to consider it."

The assignments of error are overruled and the judgment is affirmed.

We commend court appointed counsel for the able and zealous representation he has given the defendant in this case.

/s/ JOHN A. MITCHELL
JOHN A. MITCHELL, Judge

Concur:

/s/ WILLIAM S. RUSSELL
WILLIAM S. RUSSELL, Judge

/s/ ROBERT K. DWYER
ROBERT K. DWYER, Judge

Certification

Office of Clerk of Court of Criminal Appeals
For the Eastern Division of the State of Tennessee

I, John A. Parker, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Opinion of said Court, pronounced at its De-

cember term, 1971, in the case of Roy D. Plott against State of Tennessee as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 3rd day of May, 1972.

(Seal) .....Clerk

By.....D. C.

APPENDIX II

Supreme Court of Tennessee at Knoxville

September Term 1971

Filed Mar. 6, 1972
John A. Parker, Clerk

DECREE

Roy D. Plott,
vs.
State of Tennessee.

Hamilton
Criminal.
Writ Denied.

This case coming on to be heard upon a transcript of the record from the Criminal Court of Hamilton County, opinion and decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner, Roy D. Plott, will pay the costs incident to filing petition for certiorari, for which let execution issue.

ROSS W. DYER, J.
LARRY CRESON, J.
GEORGE F. McCANLESS, J.

Certification

Office of Clerk of Supreme Court
For the Eastern Division of the State of Tennessee

I, John A. Parker, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Order of said Court, pronounced at its Sep-

tember term, 1971, in the case of Roy D. Plott against State of Tennessee as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 3rd day of May, 1972.

(Seal) .....Clerk

By.....D. C.